Supreme Court, U.S.
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No.

In the

SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1997

ALI DARAKSHAN, SORRAYA MOKHTARI DARAKSHAN and REZA VALIYEE,

Petitioners,

vs.

CITY OF BERKELEY, THE BERKELEY CITY COUNCIL, THE CITY OF BERKELEY BOARD OF ADJUSTMENTS, VIVIAN KAHN, GIL KELLEY, DAN LAMBERT and REGGIE MEIGS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR A WRIT OF CERTIORARI

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42 pp

QUESTIONS PRESENTED

1. Do the standards announced in **Dolan v. City of Tigard** (1994) 114 S.Ct. 2309 apply to all land use regulations made by an administrative agency acting in a quasi-judicial capacity for the purpose of the Takings Clause (United States Constitution, Fifth Amendment)?

2. Does the failure to maintain a record of the entire administrative proceeding violate the Due Process clause (United States Constitution, Fifth Amendment)?

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PETITION FOR A WRIT OF CERTIORARI

Ali Darakshan, Sorraya Mokhtari Darakshan and Reza Valiyee (hereafter "petitioners") hereby petition for a writ of certiorari to review the decision of the Court of Appeal of the State of California, First Appellate District, Division One, filed on October 23, 1996, affirming the judgment of the trial court in favor of respondents and the denial of review issued by the California Supreme Court on January 28, 1997.

OPINIONS BELOW

The opinion of the California court of appeals *(Appendix "C")* is unreported.

JURISDICTION

The California court of appeals issued its opinion on October 23, 1996 *(Appendix "C")*. The California Supreme Court denied review on January 28, 1997 *(Appendix "D")*. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(a).

STATUTORY PROVISIONS INVOLVED

United States Constitution Fifth Amendment, Takings and Due Process Clauses as applied to the States by and through the Fourteenth Amendment.

STATEMENT

> Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government, which men would not quit the freedom of the state of Nature for, and tie themselves up under, were it not to preserve their lives, liberties, and fortunes, and by stated rules of right and property to secure their peace and quiet … And, therefore, whatever form the commonwealth is under, the ruling power ought to govern by declared and received laws, and not by extemporary dictates and undetermined resolutions, for then mankind will

> be in a far worse condition than in the state of nature ...
>
> For all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws, that both the people may know their duty, and be safe and secure within the limits of the law, and the rulers, too, kept within their due bounds, and not be tempted by the power they have in their hands to employ it to purposes, and by such measures as they would not have known, and own not willingly ... For what property right have I in that which another may by right take when he pleases? John Locke, *The Second Treatise on Civil Government*, Sections 137-140.

Petitioners were denied a permit to expand a home pursuant to respondents' ordinance, which allows respondents to deny a permit based only upon a general welfare standard, places the burden of proof to show no harm to the general welfare on the applicant and does not require quantifiable evidence to support its denial of a permit. Further, the respondents failed to maintain a record of large portions of the proceedings leading to the denial.

The Court of Appeals found this Court's decision in *Dolan v. City of Tigard* (1994) 114 S.Ct. 2309 did not apply to this case because no exaction was involved, the denial was a proper exercise of the police power and the findings and evidence supporting the decision were appropriate under current law. It also found the record kept was sufficient to meet with the Due Process standard.

Review by this Court is necessary on the grounds that the issues raised by petitioners and decided by the court of appeals concern protection of fundamental rights afforded by the Constitution and the intents and purposes of the drafters thereof and that these issues were raised, but left unresolved by this Court's holding in *Dolan*.

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SUMMARY OF MATERIAL FACTS AND PROCEDURAL HISTORY

A. The Application Process

Petitioners applied for a permit to elevate an existing single family home 9 feet (to a height of 23.5 feet) on March 26, 1993. JA 108-111; JA 79-83. The existing structure did not conform to current zoning standards in that it had 2.5 foot side and 9 foot front yards. JA 79, 121.

The City of Berkeley Zoning Ordinance, section 16.5(c)(2) provides:

> [a] nonconforming building may be enlarged, extended, or structurally altered . . . if the building is nonconforming by reason of its violation of the yard, height, coverage, or use requirements . . . and any existing nonconforming yards about such building are not further reduced by such enlargement, extension or structural alteration, and any other yards are not reduced below the requirement of this Ordinance, *and subject to the securing of a Use Permit;*

The procedure for obtaining issuance of a Use Permit from respondent is set forth in Chapter 20 of the Zoning Ordinance. That chapter, at section 20.2, provides:

> *[i]n order to grant* any Use Permit, the Zoning Officer or the Board of Adjustments *shall find* that the establishment . . . of the use or building applied for *will not*, under the circumstances of the particular case existing at the time at which the application is made, *be detrimental to the health, safety, peace, morals, comfort, and general welfare of persons residing or working in the neighborhood* of such proposed use or be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the city.

Petitioners plan did not further reduce the nonconforming yard, as respondents admit, but merely maintained it.

Pursuant to respondents' request, appellants presented each of five neighbors the plans for construction. Three of the five reviewed and signed the plans, however, the other two initially refused to even look at the plans. JA 115.

The respondents' Planning Department, after imposing several conditions wholly acceptable to petitioners, on July 23, 1993 approved petitioners' application and issued a proposed decision approving the use permit. JA 121-22. The Department specifically approved maintaining the non-conforming use. JA 121. The approval did not raise the size of the construction as an issue requiring the imposition of conditions, nor the fact it was two stories, nor any shadowing or other obstructive effect, nor a fear that the property would be used as a rooming house. JA 121.

In response to the City's notice of the proposed issuance of a Use Permit, the Planning Department received several letters from neighbors of the property disagreeing with the approval. JA 132-135. The letters mistakenly identified petitioner Reza Valiyee as an owner of the property, complained of his operation of other properties in the area and described petitioner Valiyee as a "slumlord". Other neighbors complained that the project would "ruin our life and property" because it would shadow their homes and cause increased noise in an already noisy neighborhood. JA 132-135, 143-146, 147-149.

On August 27, 1993, the Planning Department, in apparent response to these letters, rescinded its proposed approval of the permit, finding:

1. Under the circumstances, because of the non-conforming east side and front setbacks, the proposed addition would unreasonably obstruct sunlight and air to the adjacent property to the east.

2. Raising the building to construct an additional story with non-conforming front and side setbacks would be detrimental to the comfort and welfare of neighboring residents because the

resultant structure would not be in harmony with the surrounding developments on the south side of Derby Street which is characterized by smaller one-story dwellings.

3. The proposed floor plans with five bedrooms and three bathrooms would allow use of the property as a rooming house, which is not a permitted use in this district, or rental rooms, which would not be allowed without providing additional parking.

4. In that an owner [sic] of the subject property has previously operated a rooming house in violation of the Zoning Ordinance at 2227 Ward, on the same block as the subject property, and has also performed construction without required permits on the abutting property at 2708-2712 Ellsworth, there is a strong likelihood that approval of the proposed addition would result in the establishment of uses not permitted by the Zoning Ordinance as noted in 3 above. JA 96.

It is apparent the sole evidentiary foundation for these findings were the letters provided to the City by neighbors of the site. Other than the initial study which led to the proposed approval of the use permit by the Planning Department, respondents conducted no independent investigation or study of the impact of the proposed development, did not visit the site, nor apparently did they even determine who actually owned the property.

B. Proceedings Before The Respondents

On September 6, 1993, petitioners appealed the Planning Department's decision to the City's Adjustment Board. JA 92-94. The Board heard the appeal on September 27, 1993. JA 165-167. For no clear reason, no recording was made of that hearing. Instead, handwritten notes by a city employee provide the only evidence of what happened at the hearing. JA 172-173. However, even taking the notes on their face as evidence of what happened at the hearing, it is clear the Board still considered Valiyee as one of the owners and upheld denial of the permit on the bases that other of his properties were "a blight on the landscape." JA 172. When petitioners' attorney asked for specifics about why the permit was being denied, member Wofsy is noted as saying "[d]enial is because of non-conforming side

and front setbacks." JA 172. This did not state a legitimate basis for denial of the Use Permit, since the alteration of the nonconforming use is expressly allowed by the Ordinance, subject to the requirement that a use permit is obtained. Had a verbatim transcript been made, it would have revealed the strong prejudice the Board exhibited against Mr. Valiyee and the true reason why the permit was denied. JA 75-77. The Board affirmed the Department's denial, for reasons unclear on the record, *but did delete finding number 4.* JA 173. It published its decision, complete with findings which were not noted in the so-called transcript of the hearing, on October 20, 1993. JA 84.

Petitioners appealed to the City Council, arguing there was no evidence supporting respondents' finding of unreasonable obstruction of sunlight and air or lack of harmony with the neighborhood, which in fact has numerous two story buildings. Furthermore, petitioners objected to denial on the basis of what "could be" done on the property, i.e., operation of a rooming house. The statement concluded that the true reason for denial was Mr. Valiyee's perceived connection with the property. JA 75.

On January 11, 1994, the hearing on the appeal was held. JA 175. There, as respondents acknowledge, the respondents' recording of the hearing contains a long gap. It appears from the portion that was transcribable that the Council affirmed the Board's decision. JA 175-176. Again, had the tape been kept, petitioners believe it would have revealed the Council's strong bias against Mr. Valiyee and those associated with him and that, due solely to this bias, petitioners were denied a permit.

C. Judicial Proceedings

On April 22, 1994, the petitioners filed a complaint seeking relief in the forms of mandamus, declaratory relief, inverse condemnation and for violation of constitutional rights. JA 34. On May 25, 1995, the local court heard the motion on the writ of mandamus and denied the writ. JA 246 *Appendix A.*. Pursuant to a stipulation between the parties for the purposes of appeal, a judgment was entered on each of petitioners' causes of action. JA 255 *Appendix B.*

On October 1, 1996, the appeal was heard and on October 23, 1996, the California First District Court of Appeal, Division One,

issued its opinion, denying the appeal. On December 2, 1996 petitioners filed for review by the California Supreme Court and, on January 28, 1997, the Supreme Court denied review *Appendix D.*

SUMMARY OF ARGUMENTS PRESENTED AND APPELLATE DECISION

Petitioners argued that the exercise of the police power (the power to regulate in the interest of the public health, safety and welfare), particularly when delegated to an unelected administrative body, is not coextensive with a right to take property without just compensation. That, therefore, respondents' Section 20.2, which restates the general police power standard as its own standard for administratively adjudicating use permit applications, places the burden of proof on an applicant to prove a negative, i.e., that there will be no impact on the general welfare, and to prove this to a standard that is essentially limited only by the administrative board's imagination, i.e., the general welfare standard, as used to regulate petitioners' use of property, implicates the Takings Clause as a government regulation of property which "goes too far." *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415-6. The petitioners, noting the above case, argued there was no substantive distinction between conditional exactions (dedications of property or payment of impact fees to obtain permits) and unconditional denials which obtain highly similar dedications, such as an easement for light and air.

This being so, petitioners argued that the "deference" accorded generally applicable legislatively enacted zoning ordinances, as announced in *Agins v. Tiburon* (1980) 447 U.S. 255, should not be accorded to quasi-judicial regulations of individual property uses for the reasons set forth by John Locke cited above, by the Takings Clause generally and for those set forth by the Supreme Court in *Dolan, supra* specifically. Instead, Petitioners argued the standards stated by *Dolan* should apply where the applicable zoning ordinance provides only a vague, general welfare standard to guide an unelected administrative body's regulation of property.

Petitioners also argued that the actual record kept by Respondents violated due process in that the failure to preserve the hearing before the Board of Adjustments and the long gap in the tape

from the appeal before the City Council prevented the reviewing court from reviewing the whole record and petitioners from pointing to the bias and prejudice evidenced at the hearing and appeal by respondents.

Respondents argued that, as its administrative action did not amount to an "exaction" (that is, no property was appropriated, nor was a fee charged, as a condition of development), this Court's holding in *Dolan* did not apply to petitioners' application at all. Instead, it argued that the due process standards set forth in California Code of Civil Procedure Section 1094.5 alone applied to this case and those standards were met.[1] Further, while acknowledging the state of the record was as petitioners' alleged, respondents argued it was Constitutionally sufficient and that a showing of prejudice was required, but not made.

In response and at oral argument of this matter, petitioners simply noted that the concept of an "exaction" was not one that had not been fully developed and that, upon analysis, this label found no principled reason for applying a lower standard or different standard than that called for when restrictions on land use are in issue, i.e., the *Dolan* standard.

The California First District's opinion essentially agreed with respondents' argument, finding there had been no exaction. It, therefore, determined not to reach the issue of the problematic nature of administrative adjudications, found that the police power allowed respondents to regulate petitioners' use of their property as they had without compensating petitioners for the restriction of its use and held the findings adequate under Code of Civil Procedure section 1094.5 and found the record was not deficient. *Appendix C.*

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[1] California Code of Civil Procedure Sections 1094.5(b) and (c) provide the procedural standards for determining the adequacy of administrative adjudications upon judicial review. They provide that administrative agencies must produce findings which support their decisions and require that findings be supported by "substantial evidence."

REASONS FOR GRANTING THE PETITION

The court should review the issues decided by the court of appeals for two reasons. First, both issues presented concern fundamental Constitutional rights. Second, as to the regulations, its seeks resolution of an important issue left open by *Dolan*: is an exaction necessary to apply the *Dolan* standard and, if so, what constitutes an exaction?

I. DO THE STANDARDS ANNOUNCED IN DOLAN V. CITY OF TIGARD (1994) 114 S.CT. 2309 APPLY TO ALL LAND USE REGULATIONS MADE BY AN ADMINISTRATIVE AGENCY ACTING IN A QUASI-JUDICIAL CAPACITY FOR THE PURPOSE OF THE TAKINGS CLAUSE?

The Takings Clause, found in the Fifth Amendment of our Constitution, finds its philosophical basis in Locke's *The Second Treatise on Government*. In fact, Locke's philosophy largely constituted the founding father's thoughts on the proper place of government, [2] and Scholars agree, the founders found their inspiration for the Takings Clause in the *Second Treatise*.[3] Locke's theory, in brief, was that persons enter into the social contract so that their rights and freedoms will not be arbitrarily taken by each other based only upon their present strength and pleasure. To protect these rights, a legislature is created and laws made. Henceforth, society is ruled by law created by legislative process and not by the fiats of men, who by fortuity, or worse, have the power to make them. It has most recently redounded in the opinions of the Supreme Court in *Dolan*.

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[2] Diggins, ***The Lost Soul of American Politics***, 60-61 (Chicago: University of Chicago Press, 1984); McDonald, ***Novus Ordo Seclorum: The Intellectual Origins of the Constitution***, 60-66 (Lawrence: University of Kansas Press, 1985); Becker, ***The Declaration of Independence***, 27-42 (New York: Vintage Press, 1961).

[3] See Sackman, Ed., ***Nichols on Eminent Domain***, Third Edition, Section 5.01[4][b]; Alymer, ***The Meaning and Definition of "Property" in Seventeenth Century England***, 86 Past and Present 93 (1980); Dworetz, ***The Unvarnished Doctrine: Locke, Liberalism, and the American Revolution***, 71-74 (Durham: Duke University Press, 1990); Stoebuck, ***Nontrespassory Takings In Eminent Domain***.

In *Dolan*, this Court noted that special scrutiny is to be applied to property regulations in two situations: (1) when a governmental entity conditions development on the dedication to it of property and (2) when decisions regarding use are made by administrative bodies. This Court provided two reasons to distinguish legislative determinations classifying entire areas (i.e., general zoning ordinances) from adjudicative decisions made on applications for a permit to develop a single parcel. First, in the latter instance, this court had special concerns about protecting the principle behind the Takings Clause: the bar of the government from forcing some people alone to bear public burdens which should be borne by the public as a whole. In the case of administrative adjudications, these concerns are greatly heightened since such decisions necessarily effect "some people alone", whereas legislative decisions, by their nature, effect a broad expanse of people similarly. Second, due to the ad hoc nature of administrative adjudications, particularly, as here, where there is nothing but a general welfare standard to guide the adjudicator, it is very difficult to discern and assure that legitimate governmental interests are being substantially advanced. Therefore, *Dolan* placed the burden of proof in quasi-adjudicative land use procedures on the governmental entity and required the entity to produce quantifiable evidence supporting a finding that the decision substantially advances legitimate governmental interests.

Dolan left the issue unclear as to whether there needs to be both an exaction (and/or what exactly the scope of that concept is) and an administrative adjudication, or whether one or the other of the rationales would suffice to apply the standards the *Dolan* court later announced. In the California Supreme Court opinion in ***Ehrlich** v. Culver City* (1996) 12 Cal.4th 854, decided after remand by this Court upon issuance of your decision in *Dolan*, the California Supreme Court expanded the concept of exactions to include other than physical invasions and applied *Dolan* in such a case. However, no Court has ever addressed the issue of whether a restriction which obtains what is, in effect, a property right (here an easement for light and air) can also conceptually be termed an exaction or whether *Dolan* should apply to all land use administrative adjudications, regardless of whether there is an exaction.

Locke's philosophy that "the ruling power ought to govern by declared and received laws," not by "extemporary dictates and

undetermined resolutions" and that "property rights" are rendered meaningless when another may by right take them by such arbitrary dictates and resolutions and its expression in the Takings Clause of the Constitution is countered by the nature of respondents' process and by the appeals court decision in this case. While acknowledging that a regulation that goes too far "can be" a taking, the appeals court decision essentially fails to take cognizance of the fact that the Takings Clause requires special scrutiny and special precautions when regulations are made, not by legislatures, but by administrators, dealing with individuals. It also manifestly fails to recognize the fact that the police power is not unlimited and that a taking occurs even in the context of a generally applicable zoning legislation where that legislation fails to substantially advance a legitimate governmental interest. *Dolan, supra,* at 2320 fn 8.

A. THERE IS NO PRINCIPLED BASIS FOR LIMITING DOLAN'S HOLDING TO CASES INVOLVING PHYSICAL (OR FISCAL) APPROPRIATIONS: TAKINGS ARE NOT LIMITED TO CASES INVOLVING EXACTIONS, HENCE NEITHER THE RATIONALES BEHIND THE TAKINGS CLAUSE NOR THE SCRUTINY WHICH IS TO BE APPLIED TO PROCESSES WHERE RIGHTS INVOLVING THE TAKINGS CLAUSE ARE AT ISSUE SHOULD BE SO LIMITED

The holding of *Dolan* was a seminal analytic step taken by the Supreme Court to assure that the Takings Clause was not abused. While it shared with its progenitor, *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 the factual similarity of a dedication of land, the actual holding of *Dolan* is less concerned with whether there is an exaction than with whether a regulation is justified: has the adjudicator provided sufficient evidence to support a finding of substantial advancement of a legitimate governmental interest. *Dolan's* chief analytical advance was its statement of a standard for assuring that individualized administrative determinations do not run afoul of broader Takings Clause principles. It places upon the administrator the burden of proving by quantifiable evidence that its decision substantially advances a legitimate governmental interest.

In the California Supreme Court's decision in *Ehrlich v. Culver City, supra,* the defendant attempted to bypass the Takings Clause by

seeking not a dedication of the property, but fees to replace what it contended were recreational uses displaced by the proposed project. The government provided no explanation for how the fee it sought to exact was commensurate with the uses which would be lost due to the proposed use. The Court, applying *Dolan*, found that unless the defendant could provide a quantitative explanation for the fee's determination, the fee was invalid and ran afoul of the Takings Clause. This remained so despite the fact that no dedication was sought. Again, *Ehrlich* stressed the problematic nature of administrative determinations.

Respondents contend that *Dolan* simply has no application here because there was no exaction. Here, there was only an administrative denial of a use permit application. Hence, respondents' argument relies on its interpretation that *Dolan* requires both an adjudicative decision and a dedication/exaction. Even the harshest critics of the *Dolan* opinion have not easily found such a limitation in the language of the case. See Funk, *Reading Dolan v. City of Tigard*, 25 Environmental Law Reporter 127. In fact, it is more reasonable to construe from the case's language that special scrutiny should apply to all administrative land use regulations by Takings jurisprudence and by the principles the Takings Clause seeks to protect.

Respondents' argument that only cases involving dedications and/or "impact fees" are subject to *Dolan* scrutiny fails quite simply because there is no principled basis for a distinction between takings arising due to exactions and takings otherwise arising.

In *Pennsylvania Coal Co. v. Mahon, supra,* Justice Holmes adopted the theory that not only were property rights protected against appropriative or possessory takings, they were also protected against the more complex, but substantively similar, regulations which "go too far":

> if the protection against physical appropriations of property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits. If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power,

> the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared.

Mahon, supra at 414-15. Justice Holmes recognized that as much harm can come indirectly to rights by regulation and unfettered qualification as could by direct appropriation; that for the Takings Clause to be meaningfully enforced, the government's ability to redefine the range of interests included in the ownership of property must necessarily be constrained by constitutional limits; that, otherwise, the Takings Clause would be frittered away by the natural tendency of human nature to extend qualifications more and more until no rights would be left to take.

Takings apply both to appropriations of property and regulations which go too far. There is no logical reason to believe that one form of taking is worse than another and, therefore, that different standards of scrutiny should apply. The converse is true. So long as some persons alone are made to bear public burdens, the same standards should apply. *Ehrlich* shows the absurdity of trying to distinguish between takings based on possession or regulation. One can easily do by regulation what one does by possession and vice-versa. In fact, it can be argued that where a regulation has the effect of obtaining an exaction, (in *Dolan* and this case, a "green space"), that an extortionate condition is better for the property owner than an unconditional denial, where, by the former, at least some desired use is allowed by the agency.

This point is most clearly brought home by a review of the facts of this very case. Here, despite the fact that the generally applicable ordinance does not restrict residences to a single floor, nor is the neighborhood actually so restricted, respondents' findings so restrict the property -- and apparently do so in perpetuity -- since one of its findings states that no matter whether the proposed second floor does in fact obstruct others' sunlight or air, any such addition would be rejected as not in character with surrounding properties. Is this a regulation or a possessory taking in the form of an easement and/or possession/dedication of petitioners' air rights over their property? See *United States v. Causby* (1946) 328 U.S. 256. Other than the fact that no legal title is taken, how does it differ in substance from the green space the city sought to obtain in *Dolan*? Petitioners suggest

these questions are ultimately meaningless because the two forms are substantively indistinguishable.

There is no substantive distinction between takings by appropriation and those by regulation. Further, the need for support of the rationale behind the Takings Clause, the protection of "some persons alone" is the same whenever land use determinations are made in the context of administrative adjudications. Application of the *Dolan* standard should be mandated in all administrative land use adjudications.

B. THE LANGUAGE OF RESPONDENTS' SECTION 20.2, DELEGATING THE ENTIRE POLICE POWER TO ITS BOARD OF ADJUSTMENTS, DOES NOT REQUIRE A SHOWING OF SUBSTANTIAL ADVANCEMENT OF LEGITIMATE GOVERNMENTAL INTERESTS WHEN RESPONDENT REGULATES LAND USE

In *Agins, supra* at 260, this Court held that "[t]he application of a *general* zoning law to particular property effects a taking if the ordinance does not *substantially* advance legitimate state interests." While *Agins* held that where the local legislature passes an ordinance regarding land use, the burden is placed on the applicant challenging the legislation to show it does not substantially advance a legitimate public interest, as *Dolan, supra* at 2320 fn 8 , makes clear, that burden is reversed when the regulation is not made by a legislative body, but by the decision of a discretionary administrative adjudication.[4] Here, that burden cannot be met because the very ordinance giving the administrative board authority to make regulations does not require the Board to regulate in a manner which substantially advances legitimate governmental interests, but allows the Board to regulate based on what it alone believes is in the general public welfare.

Respondents' zoning ordinance section 20.2 delegates the police power (the language "health, safety, peace, morals, comfort, and general welfare" therein found is essentially a restatement of the

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[4] Petitioners agree with respondents' assertion that the idea that an administrative adjudication can regulate, that is, legislate, is oxymoronic, if not downright absurd; but this is the inherent fault of ordinance section 20.2 which delegates the legislative police power to its administrative board as legitimized by the holding of ***Grech v. City of Berkeley*** (1981) 118 Cal.App.3d 518.

police power) to its Board of Adjustments to make decisions on permit applications, i.e., to regulate individual uses of property. However, *Agins* establishes that just because a governmental act is within the police power, it does not automatically show substantial advancement of a legitimate governmental interest, nor, therefore, does it escape the scope of a Takings Clause analysis. In order to pass Takings Clause muster, something more must be done to show its regulation not only subserves the public welfare, but *substantially* advances those interests. In *Agins* and *Dolan*, this Court affirmed that the legislative process assures substantial advancement of legitimate governmental interests. Equally, however, *Dolan* affirms that the reverse is true of administrative processes.

Respondents would have us believe that anything which the Board determines is within the police power substantially advances legitimate governmental interests so long as California Code of Civil Procedure section 1094.5(b) is complied with. But this is simply wrong. Section 1094.5 is a standard of review regarding general due process standards applicable to all administrative, discretionary quasi-adjudications and does not take into account the special standards required by the Takings Clause. *Dolan, supra at 2320*, specifically noted that the Takings Clause was a separate right requiring special analysis ["[w]e see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of poor relation in these comparable circumstances"]. Further, unlike *Dolan*, respondents' 20.2 places the burden on the applicant. But not only this, it presumes that the Board met its burden. See California Evidence Code section 664; *Ward v. County of Riverside* (1969) 273 Cal.App.2d 353, 359.

What is more, *Dolan, supra,* at 2319-20, requires an individualized determination that a regulation is related in nature and extent to the impact of the proposed development. On the other hand, respondents' ordinance and California Code of Civil Procedure section 1094.5(b) does not require quantifiable evidence, but only so-called "substantial evidence", which as the appeals court opinion points out, includes the speculative --unquantified -- testimony of neighbors and board members. Appeals Court Decision, citing *Lindborg/Dahl Investors, Inc. v. City of Garden Grove* (1986) 179 Cal.App.3d 956, 963 [personal "observations", opinions, hearsay and objections of

neighbors can be substantial evidence] *Appendix C*, page 26; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 883 [substantial evidence may be comprised of discussions of board members]. Based upon the evidence actually produced at the various hearings, it is quite clear that the substantial evidence standard is not sufficient to meet Takings Clause standards: There was absolutely no evidence that the plan would in fact unduly shadow neighboring properties -- certainly no shadow study was ever performed; There was no evidence that a two story home was unusual or uncharacteristic in the neighborhood and a short drive through the neighborhood would disprove this finding; And finally, no evidence was provided that traffic or any other form of congestion would be increased by the plan, nor that the home would be used as a rooming house.

The evidence used as a basis for the denial of a permit here is the best evidence to show why the current standards are inappropriate. Without application of the *Dolan* standards there is nothing putting respondent Board of Adjustments or similarly situated administrative adjudicators to show substantial advancement of a legitimate public interest and, therefore, no assurance the Takings Clause is being complied with. Rather, denial may be based simply on the unsupported and illogical fears and phantasms of neighbors, if not merely their whims and caprices. This Court should grant this writ so it can in turn mandate use of the *Dolan* standards in this situation.

II. DOES THE FAILURE TO MAINTAIN A RECORD OF THE ENTIRETY OF THE ADMINISTRATIVE PROCEEDING VIOLATE THE DUE PROCESS CLAUSE?

As well as running afoul of the Constitution's Taking Clause, respondents' procedures ran afoul of the Due Process clause. Due Process mandates a record of the entire proceedings in administrative adjudications just so courts can review the propriety of their decisions. Courts have over and over again stated this rule where the substantial evidence standard applies. *Bixby v. Pierno* (1971) 4 Cal.3d 130, 144 [Administrative petitioner entitled to have the entire administrative record presented to court for review]; *Aluisi v. County of Fresno* (1958) 159 Cal.App.2d 823, 827-8 [Administrative body used a recording device which rendered large portions of the record inaudible and untranscribable. Record violated due process]; *Chavez v.*

Sacramento County Sheriff's Office (1978) 86 Cal.App.3d 324, 332 [Employee claiming wrongful discharge sought transcript of taped hearings, one day's tape proved too defective to transcribe. "Plaintiff is entitled to have the entire record of the administrative proceedings presented to the court for review. Where a full record has not been kept, the parties may reconstruct the record; if unable to do so, a new hearing must be held so as to provide an adequate record."] *Universal Camera Corp. v. NLRB* (1951) 340 U.S. 474, 488 (per J. Frankfurter). Here, respondents entirely failed to record the hearing before the Board of Adjustments and acknowledge the long gap in the tape recording of the hearing before the City Council while the project were being characterized to the Council, nor have they attempted to reconstruct this period of time.

Yet, the appeals court stated that, pursuant to California Code of Civil Procedure section 1094.5(b) and the substantial evidence test, due process only requires such portion of the record as is required to support the decision to perform review and pass Constitutional muster, i.e., that the petitioners must prove the negative, that evidence necessary to show there was bias and prejudice in the decision which was left out of the record.

The appeals court and respondents seem to suffer from a misunderstanding of the current law, which requires review not just to determine if any evidence supports the findings (the so-called isolation test, see California Administrative Mandamus, section 4.162 and *County of San Diego v. Assessment Appeal Board No. 2* (1983) 148 Cal.App.3d 548, fn 4; *Universal Camera, supra,* at 488; 2nd Ed., Childress & Davis, *Federal Standards of Review* section 15.04, page 15-23), but review of the entire record [consideration of "all relevant evidence in the administrative record, including evidence that fairly detracts from the evidence supporting the agency's decision"] This is both a California and United States Constitutional standard. See County of San Diego, supra at 554-5 and *Bixby,* supra at 143 fn10-144, both citing *Universal Camera, supra* at 488.

The appeals court also held no prejudice had been shown by petitioners. This is an obvious confusion between the requirement that one claiming violation of due process by procedural irregularity show prejudice, with the very prejudice which arises out of the inability to show prejudice caused by a failure to maintain a complete

record of what happened. See *Ward v. County of Riverside, supra* at 358 Without the ability to cite the court to the entire record, petitioners are denied due process and are prejudiced in not being able to show the very prejudice and bias respondents allege there is no evidence, i.e., record, of.

The respondents' also argued, and the appeals court held, that the record had been properly reconstructed, stating the handwritten notes of an employee are a sufficient reconstruction of the record, citing *Harney v. Board of Permit Appeals* (1961) 195 Cal.App.2d 442. *Harney* has no application to this case. In *Harney*, the parties stipulated to what would constitute the record before the hearing. There was simply no similar stipulation in this matter. See identical analysis of *Harney* in Hagman, et al., *California Zoning Practice*, section 10.58 ["an agreed-on summary of facts arrived at by counsel for both parties"]. It is clear the employee's notes are not sufficient to act as a *record* of the hearing. Other than the natural biases one would suspect an employee of the city would have for the city, clearly, what the employee happened to think merited note in no way provides a complete record of what actually happened, unless there is a stipulation.

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CONCLUSION

WHEREFORE, petitioners ALI DARAKSHAN, SORRAYA MOKHTARI DARAKSHAN and REZA VALIYEE respectfully request that this Court grant this writ.

Respectfully submitted,

MALCOLM A. SMITH
Counsel of Record
Pier 9, Suite 100
San Francisco, CA 94111
Telephone (415) 397-4839
Counsel for Petitioners

APPENDIX A

FILED
ALAMEDA COUNTY
MAY 25, 1995
CLERK OF THE SUPERIOR COURT
BY s/_____
DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF ALAMEDA

CLERK'S NOTICE in re RULING

#733387-7

Ali Darkashan [sic], Rez [sic] Valiyee v. City of Berkeley, et al.

In the above entitled matter pending in Department 81, you are hereby notified that court having taken matter under submission on May 25, 1995, now renders its decision to wit:
The Court orders the Writ of Administrative Mandamus is denied.

Dated May 25, 1995

CLERK SUPERIOR COURT

By: Janice Bauman, Deputy

APPENDIX B

Manuela Albuquerque, City Attorney
Christine S. Daniel, Deputy City Attorney
2180 Milvia Street, 4th floor
Berkeley, CA 94704
(510) 644-6380

Attorneys for Respondents
CITY OF BERKELEY

ENDORSED
FILED
ALAMEDA COUNTY
SEP 22 1995
CLERK OF THE SUPERIOR COUR
By Patricia Morrison

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

ALI DARAKSHAN, SORRAYA MOKHTARI DARAKSHAN, and REZA VALIYEE, Petitioners	NO. 7333887-7
vs.	JUDGMENT
THE CITY OF BERKELEY, and DOES 1 through 100, inclusive, Respondents.	

THE COURT HEREBY ENTERS JUDGMENT in the above-captioned matter based upon the following findings:

1. This Court denied the petition for Writ of Administrative mandamus and petitioners had remaining claims for declaratory relief, deprivation of rights under color of law and inverse condemnation; and

2. Petitioners Ali Darakshan, Sorraya Mokhtari Darakshan and Reza Valiyee and Respondents the City of Berkeley, the Berkeley City Council, the Zoning Adjustments Board, Vivian Kahn, Gil Kelley, Dan Lambert and Reggie Meigs through their attorneys of record stipulated and agreed as follows:

3. The order denying the petition for writ of administrative mandamus disposed of the second cause of action for declaratory relief because the claim challenged the constitutionality of Section 20.2 of the City of Berkeley Zoning Ordinance which challenge was expressly denied by the Court's order denying the writ; and

4. The order denying the petition for writ of administrative mandamus disposed of the fourth cause of action for inverse condemnation because petitioners can no longer state a claim for inverse condemnation arising out of an alleged "unlawful denial of a use permit" (See Hensler vs. City of Glendale (1994) 8 Cal.4th 1, 11); and

5. Because petitioners' sole remedy for their third cause of action alleging a deprivation of rights under law allegedly arising out of the denial of a fair trial was a petition for a writ of administrative mandamus, which petition was expressly denied by this Court,

petitioners stipulated to dismissal of the third cause of action in its entirety.

Good cause appearing therefor:

IT IS ORDERED that judgment be entered in favor of respondents and against petitioners take nothing by their action.

APPROVED AS TO FORM:

s/_____
Malcolm Smith, Counsel for Petitioners

Date: SEP 22 1995

SANDRA MARGULIES
JUDGE OF THE SUPERIOR COURT

APPENDIX C

COPY

FILED
Court of Appeal - First App. Dist.
OCT 23 1996
RON D. BARROW, CLERK
By _____
Deputy

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

ALI DARAKSHAN et al.,

Plaintiffs and Appellants, A072191

v. (Alameda County
Super. Ct. No. 7333877)

CITY OF BERKELEY et al.,

Defendants and Respondents.

The City of Berkeley (City) denied the petition of Ali and Soraya [sic] Darakshan and their agent , Reza Valiyee (petitioners) for a use permit to enlarge their single family residence. After exhausting administrative remedies, petitioners filed a petition for a writ of administrative mandamus in the superior court, seeking declaratory relief and alleging deprivation of constitutional rights under color of law and inverse condemnation. They also asserted that the administrative record was unconstitutionally deficient. This appeal follows the trial court's denial of the petition for the writ and a stipulated entry of judgment on all causes of action.

PROCEDURAL BACKGROUND/FACTS

Petitioners Ali and Soraya [sic] Darakshan own property located at 2244 Derby Street in Berkeley, California. On March 26, 1993, they submitted an application to the Berkeley Planning Commission for a use permit seeking to reinforce the foundation, raise the building and add three bedrooms and two bathrooms to the building. After a notice of proposed zoning decision was issued, indicating approval of the use permit to several conditions, neighbors voiced concerns to the City which included obstruction of sunlight and creation of shadowing, the size of the structure in relation to existing homes on the block and potential of increased congestion in an area with existing parking problems. On August 29, 1993, the zoning officer denied the use permit.

Petitioners appealed the decision to the Zoning Adjustment Board. After two hearings (9/13/93 and 9/27/93) and the consideration of evidence and testimony about the proposed use permit, the Zoning Adjustment Board denied the permit, based on three findings: (1) Under the circumstances, because of the non-conforming east side and front setbacks, the proposed addition would unreasonably obstruct sunlight and air to the adjacent property to the east; (2) Raising the building to construct an additional story with non-conforming front and side setbacks would be detrimental to the comfort and welfare of neighboring residents because the resultant structure would not be in harmony with the surrounding development on the south side of Derby Street which is characterized by smaller one story dwellings; and (3) The proposed floor plans with five bedrooms and three bathrooms would allow the use of the property as a rooming house, which is not permitted in this district, or rental rooms, which would not be allowed without providing additional parking. Petitioners appealed the Board's decision to the City Council, which affirmed the decision based on the written record. At this point, petitioners had exhausted their administrative remedies.

Petitioners thereafter filed their petition for writ of administrative mandamus, amending it after respondents' demurrer was sustained. The court denied the petition. The parties, noting that all of petitioners' theories were founded in the relief sought in the writ, stipulated to have judgment entered on all causes of action.

Petitioners appeal from the judgment entered following their stipulation.

DISCUSSION

1.
Standard of Review

The standard of review in cases involving land use zoning is either the substantial evidence test, or the independent judgment test. The substantial evidence test applies here as the claim is that the City abused its discretion in denying the use permit. The independent judgment test applies only if a fundamental vested right is involved, and "[c]ases involving abuse of discretion charges in the area of land use regulation do not involve fundamental vested rights." *(PMI Mortgage Ins. co. v. City of Pacific Grove* (1981) 128 Cal.App.3d 724,729.) The exception is where a property owner has performed substantial work and incurred substantial liabilities in good faith reliance on a building permit or on all necessary project approvals. (Ibid.) Here, petitioners never obtained any official approvals for their addition, nor did they begin construction. They have no fundamental vested right at stake to trigger application of the independent judgment test. Although they have incurred expense in the application process, this is insufficient to constitute a fundamental vested right. *(Santa Monica Pines, Ltd. v. Rent Control Board* (1984) 35 Cal.3d 858, 865-866.)

It follows that this court must determine whether substantial evidence supports the administrative agency's findings, and if these findings support the agency's decision. *(Harris v. City of Costa Mesa* (1994) 25 Cal.App.4th 963, 969.) Under this test, the agency's decision must be upheld if there is any reasonable factual basis to support the agency's decision. *(PMI Mortgage Ins. co. v. City of Pacific Grove, supra,* 128 Cal.App.3d at p.729.) Substantial evidence may be comprised of discussions of board members at public hearings *(Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872,883), or personal observations and objections by neighbors. *(Lindborg-Dahl Investors, Inc. v. City of Garden Grove* (1986) 179 Cal.App.3d 956,963.)

II.

The Denial of the Use Permit was Neither an Exaction nor a Taking

The power of cities and counties to zone is derived from section 11 of article XI of the California Constitution, which provides, "'Any county ... may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws.'" *(People v. Johnson* (1954) 129 Cal.App.2d 1,5.) Police power is defined as the power to legislate for the health, morals, safety and welfare of a community and includes the power to zone to achieve these goals. *(Acker v. Baldwin* (1941) 18 Cal.2d 341, 344.) It can be exercised although it imposes burdens on the use and enjoyment of private property. Modernly, it has a much wider scope than the suppression of offensive uses of property; it acts affirmatively to promote public welfare. *(People v. Johnson, supra,* 129 Cal.App.2d at p.6.)

Zoning ordinances expressly allow for certain uses in a particular area but provide that other uses may be authorized after consideration by a governmental agency as to whether the proposed application is in the best interest of the public convenience and necessity, and not contrary to the public welfare. A use permit facilitates a use authorized rather than proscribed by zoning regulations, but because of the possibility that it could be incompatible in some respects with the applicable zoning, a special permit is required. *(County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510.)

The present appeal is premised on a misconception by petitioners. Throughout their arguments they equate the denial of a use permit, which simply denies an application to modify an existing use of property, with an "exaction" or a "taking." They then insist that the due process rights that attach to owners threatened with a taking or an exaction apply to them, arguing that the City and the Superior Court erred in failing to accord to them the full breadth of those rights.

An exaction is a dedication of land or payment in fees by a subdivider in lieu thereof for park or recreational purposes as a condition of subdivision approval. *(Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 635.) As the City did not condition

the use permit on the requirement that petitioners take some sort of affirmative action such as dedicating portions of their property to the City, this case does not involve exaction.

There also is no basis for concluding that a taking occurred. By the provisions of the Fifth Amendment's Taking Clause and the California Constitution, article I, section 19, the government is prohibited from taking private property for public use without just compensation. A government regulation of property which "goes too far" can be defined as a taking for which just compensation must be granted. *(Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415-416.) However, the application of a governmental regulation, like a zoning ordinance, can result in a taking only if the regulation fails to substantially advance a legitimate state interest or denies the owner of all economically viable use of his land. *(Agins v. Tiburon* (1980) 447 U.S. 255, 260.) Legitimate state interests have been construed broadly to include reducing population density, preserving light and air and advancing aesthetic values to promote the general welfare. *(William C. Haas v. City & County of San Francisco* (9th Cir. 1979) 605 F.2d 1117, 1120-1121.) Here, the City did not deny petitioners all economically viable use of their land, as they were permitted to maintain the current use and intensity of their property. In addition, the City's action was taken to further the legitimate state interests of reducing population density, preserving light and air and advancing aesthetic values. No taking occurred.

III.

Petitioners' Claim that *City of Tigard* (1994) __ U.S. __; 114 S.Ct.2309, Mandates Shifting the Burden of Proof in Use Permit Cases is Misplaced

The granting of a use permit is governed by the standards enunciated in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (hereinafter *Topanga I)* (1974) 11 Cal.3d 506. Among other things, *Topanga I* places the burden of proof on applicants to set forth substantial evidence to support their application and the findings of the City or its auspices must make. *(Id. at p. 514.)* Berkeley's Zoning Ordinance section 20.2, accordingly, places the burden of proof on the party seeking the permit to put forth the evidence to prove no negative impact. Petitioners contend that this allocation of the burden of proof

violates the holding of *Dolan v. City of Tigard* (1994) ___ U.S. ___; 114 S.Ct. 2309, 2319. Petitioners' reliance on the holding of *Dolan* is erroneous in the *Dolan* only addresses those situations involving exactions. Quoting the court: "We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm.*, 483 U.S. 825 ... (1987), of what is the required degree of connection between the *exactions* imposed by the city and the projected impacts of the proposed development." (114 s.Ct. at p.2312; italics added.) As discussed above, there is no exaction in the present case.

IV.

All Due Process Requirements Placed on Zoning Regulations Were Met

The due process requirements of adjudicatory decisions such as the issuance of a use permit, were defined by the court in *Topanga I, supra*, which held that an agency rendering an adjudicatory decision must set forth findings that bridge the analytic gap between raw evidence and the decision or order. (11 Cal.3d at pp. 513-514.) This insures that the administrative body draws legally relevant sub-conclusions supportive of its decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that an agency will randomly leap from evidence to conclusion. *(Id.* at p. 516). If the evidence is insufficient to support the findings, it constitutes an abuse of discretion and is necessarily prejudicial to the appellants' rights. When this occurs, a reviewing court must issue a writ of mandamus commanding the agency to set aside its decision. *(Rogers v. Retirement Board* (1952) 109 Cal.App.2d 751, 757.) However, use permit findings requirements are cumulative, rather than in the alternative. Thus, that the evidence may not support on e of several findings requires no issuance of mandamus when other findings justifying denial are supported by the evidence. *(Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1212-1215.) The question in the present case, therefore, is whether any of the findings on which the permit was denied are supported by the evidence.

Before those findings are reviewed, however, it is noted that petitioners assert the decisions of the Zoning Adjustment Board and City Council were tainted by the mistaken belief that Reza

Valiyee was the owner of the subject property and his reputation as a "slumlord" influenced their findings and ultimately their decision. Petitioners rely on preliminary finding 4 of the zoning officer in her notice of proposed zoning decision. Finding 4 stated, "In that an owner of the subject property has previously operated a rooming house in violation of the Zoning Ordinance at 2227 Ward, on the same block as the subject property, and has also performed construction without required permits on the abutting property at 2708-2712 Ellsworth, there is a strong likelihood that approval of the proposed addition would result in the establishment of uses not permitted by the Zoning Ordinance as noted in [finding] 3 above." The Zoning Adjustment Board deleted finding 4 when presented with evidence Valiyee was not an owner of the subject property. The decisions by the Zoning Adjustment Board or the City Council were based entirely on findings 1-3. Findings 1-3 do not pertain to Reza Valiyee in any manner. Therefore, the decisions made by the Zoning Adjustment Board and the City Council could not have been tainted. In any event, the question for the reviewing court, again, simply is whether any of the findings are supported by substantial evidence.

V.

The Findings

Under Berkeley's Zoning Code, use permits are required for the construction of most types of residential structures. Zoning Ordinance section 20.2 provides that in order to grant any use permit, the City must determine that the use will not be detrimental to health, safety, peace, morals, comfort and general welfare. Specifically, section 20.2 empowers the Board of Adjustments to issue a use permit upon the findings that:

> the establishment, maintenance, or operation of the use or building applied for will not, under the circumstances of the particular case existing at the time at which the application is made, be

> detrimental to the health, safety, peace, morals, comfort and general welfare of persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the City.

This standard has been determined to be a constitutional exercise of the police power, and this discretionary system of permitting was expressly upheld in *Groch v. City of Berkeley* (1981) 118 Cap.App.3d 518, 523.

The City's findings will be considered in light the requirements of Ordinance section 20.2.

FINDING #1: The proposed second story would obstruct sunlight and air

The City's concern pertaining to the obstruction of sunlight and air is a finding supplying grounds for denying a use permit. Intensity of land use is a well recognized basis for zoning regulations and a valid consideration relating to health, safety and general welfare of a community. Statutory recognition of this concern is housed in Government Code section 65850, subdivision (c) empowering the legislative body of any county or city to regulate intensity of land use by ordinances. In addition, as recognized by the court in *Berman v. Parker* (1954) 348 U.S. 26, the values ensconced in the concept "general welfare" are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine a community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. (348 U.S. at p.33.) The interference with the comfort and general welfare of the residents resulting from the obstruction of air and light therefore justifies the denial of a use permit.

The evidence relating to the obstruction of sunlight and air substantiates the finding made by the City. As held in *Lindborg-Dahl Investors, Inc. v. City of Garden Grove, supra,* 179 Cal.App.3d 956, personal observations and objections by neighbors may constitute substantial evidence. *(id.* at p. 963.) One letter sent to the City in response to the permit application by an abutting homeowner explained: "Such a

structure will completely destroy and ruin our property. First of all, a second story will obstruct wholly the sunlight and cast a permanent shadow on our property ... With a second floor in the house at 2244 Derby, our house will become almost uninhabitable." Other correspondence relating to the addition included concerns that an additional story would cast a permanent shadow on neighboring property, cause traffic congestion and would be incompatible with the surrounding residences. Finding 1 is supported by substantial evidence.

Petitioners argue that *Dolan* requires a quantification of how or why the proposed project would obstruct sunlight or air to property to the east to objectively determine whether the finding was correct or mere speculation. As discussed above, *Topanga I*, rather than *Dolan*, is the appropriate authority, and requires only that the findings be supported by substantial evidence. There is no authority for the proposition that the City has to undertake quantitative studies regarding shadows or obstruction of sunlight to support a finding made in denying a use permit. It is enough that the finding is supported by personal observations.

Petitioners also contend that Zoning Ordinance section 16.0 allows a non-conforming use, applicable to subject property due to 2.5 feet side and 9 feet front yards, to be maintained as long as it is not enlarged, increased or extended to occupy a greater area. They assert that the language of this ordinance does not prohibit them from adding a second level to their home. While this assertion is accurate, it does not alter the fact that finding 1, concerning the effect of petitioners' proposal on light and air, is supported by substantial evidence.

FINDING #2: The proposed two story structure is not in harmony with the neighborhood

The primary requirement for granting a use permit is that the integrity and character of the district, the utility and value of adjacent property and the general welfare of the neighborhood will be preserved. *(Tustin Heights Assn. v. Bd. of Supervisors* (1959) 170 Cal.App.2d 619, 634.) Discretion to make such decisions rests with the City or its auspices. The court in *Guinnane v. San Francisco City Planning Com.* (1989) 209 Cal.App.3d 732, 737 held the city, acting through its auspices, was

empowered to exercise discretionary review and determine whether a proposed residential development was suitable for its intended location. The holdings of these cases confirm that preserving the harmony of a community is a valid ground for denying a use permit.

The evidence is that petitioners seek to build a two story home in a primarily single story area. Residents complained that the second story addition would "destroy the symmetry and beauty" of a row of single family residences. the house would become considerably larger than others in the immediate vicinity and its appearance would be incongruent with that of the neighborhood. In *Harris v. City of Costa Mesa, supra,* 25 Cal.App.4th 963, a case directly on point, the plaintiff applied for a conditional use permit to raze his detached garage and convert it to a garage and apartment. The Planning Commission denied the permit finding that the use was inconsistent with the existing neighborhood, and the City Council affirmed. *(Id.* at p. 966.) The City Council based its decision on the incompatibility of the structure with the particularly unique tract area, noting that the project was not in character with the rest of the neighborhood. *(Id.* at p. 970.) Here, as in *Harris*, the evidence is that the project proposed by petitioners would result in a structure not in character with the rest of the neighborhood. Finding 2 is supported by substantial evidence.

Petitioners again rely on *Dolan* to argue finding 2 has not been quantified. As stated above, the type of quantification demanded by petitioners is not necessary with respect to the denial of a use permit. It is enough that the evidence supports the finding that the proposed structure is not compatible and in harmony with the immediate area.

FINDING #3: The proposal will cause congestion and the need for additional parking

Action taken by the City relating to traffic and parking control is a rational and legitimate attempt to manage congestion and insure that there is adequate parking for the residents of the area. Zoning Ordinance section 20.2 provides a use permit will be granted only if "... use or [permit] applied for will not ... be detrimental to the health, safety, peace, comfort ... of persons residing or working in the neighborhood ... ."

The record reflects substantial evidence based on personal observation that the neighborhood is presently congested. The court in *Redwood City Co. of Jehovah's Witness v. City of Menlo Park* (1959) 167 Cal.App.2d 686, 697 held that use permit review and approval may take into consideration location and availability of adequate off street parking. Similarly, the court in *City of Chula Vista v. Pagard* (1981) 115 Cal.App.3d 785, 798 (citing *Nolden v. East Cleveland City Comm'n* (1966) 12 Ohio Misc. 205, 232 N.E.2d 421), held that to prevent overcrowding, a community can place a limit on the number of occupants in a household. The addition proposed here would add to the number of bedrooms in the residence, permitting an increase in the number of residents and exacerbating the traffic and parking conditions in the area. The finding again is supported by the evidence, and again, it is not relevant that the findings may fail to meet the standard set forth in *Dolan*.

VI.

The Record is not Unconstitutionally Deficient

Petitioners also claim the record provided by respondent is unconstitutionally deficient because (1) the audio tape recording of the September 27, 1993 Zoning Adjustment Board meeting was defective, and (2) there was a gap in the audio tape of the City Council meeting. It is true that if a verbatim record is not kept and sufficient reconstruction cannot be made, a reviewing court may order that a new hearing be conducted and an adequate record made. (See *Chavez v. Civil Service Com.* (1978) 86 Cal.App.3d 324, 332.) In the present case, however, the record of the Zoning Board was reconstructed by way of the zoning officer's contemporaneous notes. This method is

legally sufficient and more accurate than that expressly approved in *Chas. L. Harney, Inc. v. Board of Permit Appeals* (1961) 195 Cal.App.2d 442, 445, where attorneys orally recreated the record in chambers.

The administrative record presented to the trial court for review filled the gap in the tape from the zoning officer's presentation of the facts. The administrative record, the bulk of which is composed of facts, adequately supplemented the oral presentation of facts. According to *Aluisi v. County of Fresno* (1958) 159 Cal.App.2d 823, 826, all that is required is "a record of the proceedings adequate to enable a court to pass upon the validity of the administrative action ... " The administrative record meets this requirement. Petitioners were not prejudiced because no information was omitted from review. They failed to show that the record is deficient, that the current state of the record prevents adequate review of the action taken by the City or that their procedural due process rights were impinged upon. Since all information that claims to be missing can be found in the administrative record, which was reviewed in its entirety, petitioners cannot legitimately assert the record was deficient.

The judgment is affirmed.

_____

Stein, J.

We concur:

_____

Strankman, P.J.

_____

Dossee, J.

(Darakshan v. City of Berkeley - A072191)

APPENDIX D

SUPREME COURT
FILED
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By _____
Deputy

First Appellate District, Division One, No. A072191
S057592

IN THE SUPREME COURT OF CALIFORNIA

ALI DARAKSHAN et al., Appellants

v.

CITY OF BERKELEY et al., Resopndents [sic]

Petition for review DENIED.
The request for an order directing publication of the opinion is denied.

_____
Chief Justice

No. 97-379

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1996

ALI DARAKSHAN, SORRAYA MOKHTARI DARAKSHAN and REZA VALIYEE,

Petitioners,

vs.

CITY OF BERKELEY, THE BERKELEY CITY COUNCIL, THE CITY OF BERKELEY BOARD OF ADJUSTMENTS, VIVIAN KAHN, GIL KELLEY, DAN LAMBERT and REGGIE MEIGS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of California

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court expand the application of the "rough proportionality" standard articulated in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) for determining the necessary balance between the impact of a proposed development and the amount of mitigation that may be exacted by the local permitting agency to mitigate that impact, to cases where permits are denied and therefore no impact or exaction exist?

2. Should this Court review a state court's determination that an adequate record was presented to it for review of an administrative decision?

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STATEMENT OF THE CASE

This petition arises out of the City of Berkeley's denial of a use permit to double the size of an existing single family home in an urban neighborhood of single family dwellings. The California courts determined that the City's decision was supported by substantial evidence in the administrative record and denied petitioners' request for a writ of administrative mandamus pursuant to California Code of Civil Procedure § 1094.5.

Petitioners now request that this Court grant their petition for writ of certiorari on the grounds that the issues considered by the California Court of Appeal in this case were "raised, but left unresolved by this Court's holding in *Dolan*." (Petition for Writ of Certiorari, p. 2.)

Petitioners mischaracterize the holding of *Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) as well as the proceedings below. First, the California Court of Appeal, applying the standard set forth by the California Supreme Court in *Topanga Assn. for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506 (1974), found that the City's decision was supported by proper findings which "bridged the analytic gap" between the evidence and the decision, and that each of the findings was supported by substantial evidence in the administrative record. Second, the Court of Appeal found that because the instant case involved the denial of a use permit, rather than the granting of a permit conditioned upon the imposition of an exaction, this Court's decision in *Dolan* did not apply:

> Petitioners' reliance on the holding of *Dolan* is erroneous in that *Dolan* only addresses those situations involving exactions. Quoting

> the court: "We granted certiorari to resolve a question left open by our decision in *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987), of what is the required degree of connection between the *exactions* imposed by the city and the projected impacts of the proposed development."

(Petition for Writ of Certiorari, Appendix C, p. 29.)

Here, there was no exaction. The issue addressed in *Dolan* is irrelevant to this case. Accordingly, there is no basis for this Court to grant the petition for writ of certiorari.

SUMMARY OF MATERIAL FACTS

Petitioners' statement of facts (Petition for Writ of Certiorari, pp. 3-6) is generally accurate, with one glaring exception. To place their misrepresentation in context, we briefly state the material facts below.

Ali Darakshan and Sorraya Mokhtari Darakshan own a single family house at 2244 Derby Street, Berkeley, California. On March 26, 1993 they applied for administrative issuance of a Use Permit under the City's Zoning Ordinance, to reinforce the foundation, raise the building and add three bedrooms and two bathrooms to the building. (Joint Appendix submitted to California Court of Appeal in lieu of clerk's transcript ("JA") at 108.) Under section 20.2 of the City's Zoning Ordinance, a Use Permit may only be issued if the Zoning Officer or Zoning Adjustments Board finds that

> . . . the establishment, maintenance or operation of the use or building applied for will not, under the circumstances of the

> particular case existing at the time at which the application is made, be detrimental to the health, safety peace, morals, comfort and general welfare of persons residing or working in the neighborhood of such proposed use or be detrimental or injurious to property and improvements in the neighborhood or to the general welfare of the City.

On May 11, 1993 the City informed petitioners that their application could not be processed until they submitted additional information including an explanation as to why a five bedroom, three bath residence would not be detrimental under section 20.2, and therefore impermissible, when only one parking space was provided. (JA at 113.) The Zoning Officer also included the standard requirement that petitioners obtain the signatures of all of the owners of abutting and confronting properties indicating their lack of objection to the project. (*Id.*)

Petitioners' agent contacted five immediate neighbors and informed the City that three had signed the plans and two had refused. (JA at 115.) In a subsequent letter he explained that the additional bedrooms were necessary due to frequent visits from relatives. (JA at 119.) On July 23, 1993 the Zoning Officer issued her Notice of Proposed Zoning Decision indicating her intent to grant the Use Permit subject to several conditions. (JA at 121.) This Notice also included a request for public comment.

The Zoning Officer thereafter received several letters from neighbors objecting to the proposed decision. (JA at 132-135.) The neighbors' objections included obstruction of sunlight and creation of shadowing, as well as increased congestion due to pre-existing parking problems in the neighborhood.

The Zoning Officer notified petitioners that due to the level of neighborhood opposition, she would not approve the Use Permit administratively (JA at 137), and suggested that petitioners meet with their neighbors to resolve their concerns. She stated that if they failed to do so, she would deny the application and they could appeal to the Zoning Adjustments Board. Petitioners' agent requested the application to "follow its course to completion." (JA at 141.) Thus, the Zoning Officer issued her Notice of Proposed Decision to deny the Use Permit (JA at 96), and petitioners appealed to the Zoning Adjustments Board. (JA at 92.)

Petitioners summarize this process as: "On August 27, 1993 the Planning Department, pursuant to section 20.2 [of the Zoning Ordinance], rescinded its approval of the permit . . ." (Petition for Writ of Certiorari, p. 4.) We surmise that this misrepresentation is intended to convey the impression that the City's decision making was entirely arbitrary, and that a right properly granted was capriciously taken away. In fact, as described above, the City's process in cases where a permit may be issued by the Zoning Officer without a hearing, rather than by the City's appointed Zoning Adjustments Board after a public hearing, is to seek public input as to a proposed decision, and to consider the evidence that results. That is exactly what happened here; the City did not "rescind its approval of the permit."

The Zoning Adjustments Board held hearings on September 13, 1993 and September 27, 1993 and considered testimony and evidence from the neighbors as well as from petitioners' agents. (JA at 132-135, 139-154, 165-177.) On September 27, 1993 the Board voted to deny the Use Permit and made three findings. The first finding specifically describes the City's concern that detriment to the adjacent property to the east would result from the unreasonable obstruction of sunlight and air. (JA at 84.) The second finding describes how the proposed two-story structure

would be out of harmony with the surrounding development. (*Id.*) The third finding expresses the City's concerns about increased congestion resulting from the size of the project. (*Id.*) The Notice of Decision was issued on October 20, 1993. (JA at 84.)

On November 1, 1993 petitioners appealed the Board's decision to the City Council, which affirmed the Board's findings and decision at its regular meeting of January 11, 1994 on the basis of the written record and without taking further testimony. (JA at 65.)

REASONS FOR DENYING THE WRIT

I.

PETITIONERS FAIL TO ASSERT A PROPER BASIS FOR REVIEW OF THE CALIFORNIA COURT'S DECISION.

Rule 10 of the Rules of the Supreme Court of the United States describes the "character of the reasons" this Court will consider when determining whether to grant a petition for certiorari from the final decision of a state court of last resort. These include:

> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States Court of appeals has decided an important question of federal law that has not been, but should

> be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioners assert that this case is properly before this Court for review because "the issues raised by petitioners and decided by the court of appeals concern protection of fundamental rights afforded by the Constitution and the intents and purposes of the drafters thereof and that these issues were raised, but left unresolved by this Court's holding in *Dolan*." (Petition for Writ of Certiorari, p. 2.) As described below, however, the decision of the California court of appeal is not in conflict with *Dolan* because the standard of review articulated in *Dolan* does not apply to denials of permits. Rather, the California Court of Appeal decided this case under the standard of review articulated by the California Supreme Court in *Topanga*, 11 Cal. 3d 506. That decision does not conflict in any way with any decisions of this Court. Accordingly, certiorari is not proper and the petition should be denied.

II.

IN CALIFORNIA THE STANDARD OF REVIEW OF A QUASI-JUDICIAL DECISION DENYING AN APPLICATION FOR A LAND USE ENTITLEMENT WAS SET FORTH IN *TOPANGA*, AND PETITIONERS CONCEDE THAT THE CITY'S DECISION DENYING THEIR USE PERMIT APPLICATION MET THIS STANDARD.

Where, as here, a local agency in California makes an adjudicative land-use decision denying a permit, that agency must make specific findings in support of its decision. The purposes of such findings are to make the agency's decision-

making process orderly, to reduce the likelihood the agency will randomly leap from evidence to conclusion, to enable the parties to determine whether and on what basis to seek judicial review, and to apprise the reviewing court of the basis for the agency's decision. (*Topanga*, 11 Cal. 3d at 514-517.) Local agencies are afforded great discretion in the manner in which findings are recorded. (*See, e.g., Jacobsen v. County of Los Angeles*, 69 Cal. App. 3d 374, 390 (1977).) "It is enough if the findings form an analytical bridge between the evidence and the agency's decision." (*Topanga*, 11 Cal. 3d at 515.)

The agency's findings must be supported by substantial evidence in light of the whole administrative record. (California Code of Civil Procedure § 1094.5(c); *Arnel Development Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 518-19, n.8 (1980); *Guinnane v. San Francisco Planning Comm.*, 209 Cal. App. 3d 732, 742, n.7 (1989).) "Substantial evidence" means "[e]nough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (*Smith v. County of Los Angeles*, 211 Cal. App. 3d 188, 199 (1989).)

Here the trial court and the court of appeal upheld the City's decision under both prongs of the *Topanga* test: the findings supported the decision and the findings were supported by substantial evidence in the record. Petitioners do not challenge these holdings and no federal question was raised by the state court below.

III.

DOLAN DOES NOT ALTER THE REQUIREMENTS OF *TOPANGA*; THE STANDARD OF REVIEW ARTICULATED IN *DOLAN* DOES NOT APPLY TO ALL QUASI-JUDICIAL DECISIONS REGARDING LAND USE ENTITLEMENTS, RATHER, IT APPLIES ONLY TO THOSE WHICH REQUIRE DEDICATION OF PROPERTY OR EXACT MONEY AS CONDITIONS OF APPROVAL.

Petitioners do not challenge the California courts' conclusions under *Topanga*, but rather claim that since *Dolan*, 512 U.S. 374, 114 S. Ct. __, 129 L. Ed. 2d 304, California Code of Civil Procedure § 1094.5 and *Topanga* are no longer good law because *Dolan* somehow requires "denial" to be "roughly proportional" to impacts. (Petition for Writ of Certiorari, p.15.) This proposition is absurd on its face: where a project is denied, there is no impact to be mitigated and no exaction can be imposed which must be proportional to the (non-existent) impact. In any event, *Topanga* already requires the appropriate nexus between a governmental decision denying the permit and the impact to be avoided by denial: it requires findings justifying denial and substantial evidence in support of those findings. Thus, *Topanga* already requires rational decision making supported by adequate evidence.

Petitioners assert that certiorari is proper because there is "no principled basis for limiting *Dolan*'s holding to physical (or fiscal) appropriations" and thus that the heightened standard of scrutiny articulated by this Court in *Dolan* should apply to "all land use regulations made by an administrative agency acting in a quasi-judicial capacity." (Petition for Writ of Certiorari, p. 9-11.) Petitioners misunderstand and consequently, seek to misapply *Dolan* to this case. First we will discuss why there is

no taking here under the proper test, then we will address why *Dolan* does not apply.

A. Under The Existing Standard For Determining Whether The Application Of A Land Use Regulation To A Specific Property Constitutes Inverse Condemnation, There Has Been No Taking Here.

The application of a governmental regulation like a zoning ordinance constitutes inverse condemnation (a "taking" by regulation or "regulatory taking") only if the regulation fails to substantially advance a legitimate state interest or denies the owner all economically viable use of his or her land. (*Agins v. Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980); *Keystone Bituminous Coal Association v.DeBenedectis*, 480 U.S. 470, 485, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987).) Legitimate state interests have been construed broadly to include reducing population density, preserving light and air and advancing aesthetic values to promote general welfare. (*Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974); *William C. Haas v. City and County of San Francisco*, 605 F.2d 1117, 1120-1121 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980), *reh'g denied*, 446 U.S. 929 (1980).) The use permit process established by the City of Berkeley's Zoning Ordinance — and specifically the section at issue in this case — has been found to advance legitimate governmental interests and to be a proper exercise of its police power. (*See Groch v. City of Berkeley*, 118 Cal. App. 3d 518 (1981).) Petitioners do not assert that the City's decision was in any way inconsistent with the standard enunciated in its Zoning Ordinance, or that the City's decision was not supported by sufficient evidence. Thus, petitioners concede that the City's decision is valid under the "legitimate governmental purpose" prong of the *Agins-Keystone* test because it serves the legitimate governmental purposes set forth in the Zoning Ordinance.

A regulation which serves a legitimate state interest effects a taking only if it denies the owner economically viable use of the land. (*Agins*, 447 U.S. 255.) A regulation that does not eliminate any existing use of property does not effect a taking because it does not interfere with the owner's primary expectation of continuing the present use of the property. (*Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 130 (1978); *Oceanic California Inc. v. City of San Jose*, 497 F. Supp. 962, 974 (N.D. Cal. 1980).) Moreover, as long as the regulation permits reasonable beneficial use of the property, it does not effect a taking. (*Penn Central*, 438 U.S. at 124.)

Here, the City's decision to deny a permit to double the size of an existing single family home does not constitute a taking. Petitioners have an existing single family residence, the use of which was not affected in any way by the denial of the use permit to expand the dwelling. Clearly they have retained beneficial use of their property. Indeed, they do not claim otherwise.

Accordingly, under well-established precedent, petitioners have simply alleged no cognizable taking.

B. Petitioners' Argument That The Denial Of A Permit Is Equivalent To An Exaction Of Property Or Money Is Without Basis.

Instead, petitioners advance a new test for regulatory takings, by trying to shoehorn into the *Agins-Keystone* doctrine, the test articulated by this Court in the context of exactions of land or money in exchange for development permits. (*See Dolan*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 and *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996), *cert. denied*, __ U.S. __, 136 L. Ed. 2d 218 (1996).) The basis for petitioners' argument is their assertion that there is no difference between

an adjudicative decision denying a permit to expand an existing use on the ground of public detriment, and one exacting money or real property from an application in exchange for granting a permit. This assertion is factually incorrect and without legal basis.

The purpose of dedications and exactions is to mitigate the impacts of development; thus when the permission to develop is denied, dedications and exactions are not at issue. When a project is denied, there are no impacts to mitigate and no conditions are imposed. There is no exchange, no bargain, which the courts must scrutinize in order to ensure that government has not improperly taken advantage of its greater bargaining power. Accordingly, the standards set forth in *Dolan* logically cannot be applied in situations where there are no conditions imposing exactions or dedications.

In *Nollan v. California Coastal Commission*, 483 U.S. 825 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), this Court held that in order to exact land as a condition of a development permit, there must be an "essential nexus" between the impacts of the development and the exaction of property. (*Id.* at 837.) Since this Court found that the requisite nexus was not present in the case before it, it did not analyze the propriety of the amount of the land required to be dedicated.

In *Dolan* this Court then addressed the standard for evaluating the amount of land that could be exacted. It expressly limited its holding to resolving the question of "what is the required degree of connection between exactions imposed by the city and the projected impacts of the proposed development" in the context of the exaction of a possessory interest in property. (*Dolan*, 512 U.S. at __, 129 L. Ed. 2d at 311.) This Court concluded that the amount of dedication of land exacted as a condition of approval of a development project must be "roughly

proportional" to the impacts of that development. Rough proportionality does not require a precise mathematical calculation, but merely an individualized determination that the exaction is related both in nature and extent to the project's impacts. (*Dolan*, 512 U.S. at __, 129 L. Ed. 2d at 320.)

Finally, and most recently, this Court denied certiorari in *Ehrlich*, 12 Cal. 4th 854, *cert. denied*, __ U.S. __, 136 L. Ed. 2d 218. In *Ehrlich*, the California Supreme Court, (on review after remand from this Court to the court of appeal ordering it to reconsider its decision in light of *Dolan*), applied *Nollan* and *Dolan* to exactions of money where such exactions were imposed on an ad hoc basis in connection with a land use approval for an individual project, rather than pursuant to an ordinance or resolution of general application. Relying on *Nollan*, the court characterized the type of police power exercise at issue in *Ehrlich* as "leveraging" — "the imposition of *unrelated* exactions as a condition for granting permit approval". (*Id.* at 868, emphasis in original.) "It is in this paradigmatic permit context — where the individual property owner-developer seeks to negotiate approval of a planned development — that the combined *Nollan* and *Dolan* test quintessentially applies." (*Id.*) The *Erhlich* court then concluded that the *Nollan-Dolan* test is applicable only in a

> . . . relatively narrow class of land use cases — those exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation. Neither *Nollan* nor *Dolan* is, after all, a conventional regulatory takings case. Rather, as the court's rationale in *Nollan* demonstrates, both are cases in which the local government attached a condition to the issuance of a development

> permit which *but for* the claim that the exaction is justified by the greater power to deny a permit altogether, would have amounted to an uncompensated requisition of private property.

(*Id.*, emphasis in original.)

The underlying rationale for this heightened scrutiny is the

> . . . inherent and heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends, there by avoiding what would otherwise be an obligation to pay just compensation . . . It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of scrutiny formulated by the court in *Nollan* and *Dolan*.

(*Id.* at 869, emphasis in original.)[1]

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1. In his concurring opinion in *Kavanau v. Santa Monica Rent Control Board*, __ Cal. 4th __ (1997) (No. S051847, decided August 26, 1997) 97 C.D.O.S. 6858, California Supreme Court Justice Mosk notes, "The notion that rent control laws may now be subject to a more exacting form of constitutional scrutiny is predicated on a reading of *Nollan v. California Coastal Commission* (1987) 483 U.S. 825. (See Radford, supra 22 SW U.L. Rev. at 1030.) We have rejected elsewhere the contention that *Nollan* and the related case of *Dolan v. City of Tigard* (1994) 512

(Cont'd)

This is consistent with this Court's articulation of the rationale for heightened scrutiny as set forth in *Nollan*:

> . . . our cases describe the condition for abridgement of property rights through the police power as a "substantial advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjectives where the actual conveyance of property is made a condition for the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

(*Nollan*, 483 U.S. at 841.)

In short, the *Nollan-Dolan* standard, as elaborated by *Ehrlich*, applies only where the government (1) *exacts property or money* (2) *on an ad hoc*[2] *basis* (3) *as a condition for issuance of a permit*. It applies in this "relatively narrow class of . . . cases" because only such cases present the risk present that the government will use its police power to give itself an unfair advantage in negotiating a project approval.

As petitioners concede, only one of the three criteria which trigger this level of scrutiny is present here: an adjudicative

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(Cont'd)

U.S. 374 represent a new standard of scrutiny of governmental regulation other than those regulations that require either a physical dedication of property, or a development fee levied on an 'individual and discretionary basis.' (*Erhlich v. City of Culver City* (1996) 12 Cal.4th 854, 876.)" (*Kavanau*, 97 C.D.O.S. at 6864, fn.1.)

2. *I.e.*, in an adjudicative decision.

decision. There was no approval, and *a fortiori* there was no exaction. There was no risk of "leveraging" the police power or using it to drive an unfair bargain and accordingly no need for *Dolan* scrutiny. Rather, the applicable standard of review is that set forth by the California Supreme Court in *Topanga*, 11 Cal. 3d 506, 510: whether the City made legally adequate findings to support its decision, and whether those findings and the decision were supported by substantial evidence in the record. Because petitioners challenge neither leg of this test in their petition for writ of certiorari, it should be denied.

IV.

THE RECORD WAS ADEQUATE AND PETITIONERS' CONTENTION TO THE CONTRARY DOES NOT JUSTIFY A GRANT OF REVIEW.

Petitioners contend that they have been denied procedural due process because the transcript of one of the two hearings before the City's Zoning Adjustments Board was defective and had to be reconstructed based on the Zoning Officer's contemporaneous notes, and because there is a gap in the audiotape of the City Council meeting. This argument offers no ground for this Court to grant certiorari. The law in California is not in conflict with the federal law, nor have petitioners identified any such conflict in any of the decisions they cite, or the state court of appeal decision at issue herein. Nor is certiorari necessary to settle an important question of federal law.

There is no shortage of authority regarding the basic rules applicable to administrative records. (*Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971) (judicial review of Secretary of Transportation's decision to approve route and design of roadway must be based on full administrative record); *Federal Trade Comm. v. Standard*

Oil Co., 355 U.S. 396, 78 S. Ct. 369, 2 L. Ed. 2d 359 (1958) (Supreme Court will affirm decision of court of appeals vacating order of FTC regarding discriminatory pricing where case turned on factual issue decided by court on fair assessment of the record); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456 (1950) (court reviewing decision of the NLRB must consider all the evidence in the record, not just the evidence which supports the decision); *Hiatt Grain & Feed, Inc. v. Bergland*, 446 F. Supp. 457 (1978), *aff'd*, 602 F.2d 929 *cert. denied*, 444 U.S. 1073, 100 S. Ct. 1019, 62 L. Ed. 2d 755 (1980) (plaintiff must affirmatively demonstrate that the administrative record upon which defendant's decision was made was inadequate, otherwise review must be limited to the administrative record).)

This case simply represents one application of the well settled rules regarding review of administrative records to a specific factual situation. Thus, there is no basis for this Court to grant review.

It is beyond dispute that petitioners challenging an adjudicative action are entitled to have the record of the proceedings presented to the court for review. (*Bixby v. Pierno*, 4 Cal. 3d 130, 144 (1971), citing *Universal Camera*, 340 U.S. 474.) However, the adequacy of such records is not a matter of form but of substance and functionality. All that is required is a "record of the proceedings adequate to enable a court to pass upon the validity of the administrative action . . . ." (*Aluisi v. County of Fresno*, 159 Cal. App. 2d 823, 826 (1958).) The gaps in the audio-tape recording of one of the administrative hearings in this proceeding were reconstructed by way of the Zoning Officer's contemporaneous notes (JA at 76-77), an acceptable method under California law and not inconsistent with any federal authority cited by petitioners. (*Chavez v. Civil Service Commission*, 86 Cal. App. 3d 324, 332 (1978); *Chas. L. Harney,*

Inc. v. Board of Permit Appeals, 195 Cal. App. 2d 442, 445 (1961).)

Appellants imply that the Zoning Officer's contemporaneous notes must be presumed to be somehow inaccurate because of "the natural biases one would suspect an employee of the city would have for the city . . ." (Petition for Writ of Certiorari, p. 19.) To the contrary, however, the Zoning Officer's contemporaneous notes must be presumed to be accurate, rather than inaccurate (California Evidence Code § 664), especially given petitioners' complete failure to specify a single respect in which her notes are inaccurate or incomplete.[3]

Petitioners have failed to demonstrate any defects in the administrative record that render it inadequate "to enable a court to pass upon the validity of the administrative action . . . ." (*Aluisi*, 159 Cal. App. 2d at 826.) Absent such a showing by petitioners, it was proper for the California courts to review the record submitted. (*Hiatt*, 446 F. Supp. 457.) There is no conflict in the law regarding review of administrative records and there is no showing that the well settled law was misapplied in this case. Most importantly, none of these issues concerning the record raise federal questions. Accordingly, there is no basis for this Court to grant review.

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3. With respect to the City Council hearing, the gap in the tape occurs during the Zoning Officer's presentation of the facts, all of which are also set forth in the more than seventy pages of administrative record presented for the trial court's review. (JA at 65-176.) Moreover, as required by the Zoning Ordinance, the City Council based its decision to affirm the Zoning Adjustments Board's denial of the permit solely on the written record, thus there was no additional testimony taken to which a reviewing court was denied access. Petitioners have failed to suggest how the lack of a verbatim transcript of the Zoning Officer's presentation of the written materials already contained in the record to the City Council resulted in any relevant or material omissions from the record before the trial court.

CONCLUSION

For all of the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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